DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0615
Appellee,	)	DEPARTMENT B
v.	)	
PHYLLIS MAY BEAR,	)	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-163609-001 DT

The Honorable Christopher Whitten, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender
By Edith M. Lucero, Deputy Public Defender — Phoenix
Attorneys for Appellant

K E S S L E R, Judge

¶1 Phyllis May Bear ("Bear") was tried and convicted for resisting arrest and escape in the third degree. Bear's counsel filed a brief in accordance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Finding no arguable issues to raise, counsel requested this Court search the record for fundamental error. Bear was given the opportunity to, but did not file, a pro per supplemental brief. In *Anders* appeals, we review the entire record for fundamental error. The record does not reveal any fundamental error, and we affirm Bear's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 In reviewing the sufficiency of the evidence, we examine the evidence in the light most favorable to sustaining the judgment and resolve all reasonable inferences against the defendant. *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

¶3 At 3:30 p.m. on September 28, 2007, Bear, a clerk at Circle K, called 9-1-1 to report a forgery. An automatic safe had rejected several bills a customer presented to purchase a money order. Bear told the customer he would have to return the next day to speak with a manager. She called 9-1-1 when the customer threatened her. The customer made a separate 9-1-1 call complaining that Bear refused to return his money.

¶4 Officers L. and T. responded to the call. Both were in uniform. When Officer T. asked about the specifics of the forgery, Bear replied she didn’t know and proceeded to assist customers. Officer L. testified Bear refused to provide him with information for his report. He warned Bear he would arrest her if she did not participate in the investigation. She responded, "[y]ou can't arrest me" and called for the next customer. In response, he arrested Bear for obstructing governmental functions and led her outside in handcuffs. Officer T. searched Bear and placed her in the back of Officer L.'s patrol car.

¶5 A few minutes later, Officer T. saw Bear's "hand out the window reaching towards the door handle." When Officer T. opened the door, both Bear's hands were in front of her, and her left hand was no longer handcuffed. She appeared to be attempting to remove the other handcuff. Officer T. grabbed Bear's right arm and ordered her to step out of the vehicle. While Officer T. was getting Bear out, Bear fell against Officer T., forcing the officer backwards. Officer T. testified she did not know whether Bear had lost her balance or was trying to push into her. Officer T. continued to hold Bear's right arm, but was unable to get control of her left arm despite ordering Bear to put her arms behind her back. Officer T. pulled Bear to the

ground and held her until Officer L. returned and helped recuff Bear.

¶6 The State charged Bear with aggravated assault, resisting arrest, and escape in the third degree, all class six felonies. She pled not guilty.

¶7 The court granted Bear's motion requesting a full Rule 11 evaluation. The court found Bear competent under Arizona Revised Statute ("A.R.S.") section 13-4510(B) (2001), being able to understand the proceedings and assist counsel with her defense.

¶8 Bear waived her right to a jury trial. After the State rested, defense counsel moved successfully under Arizona Rule of Criminal Procedure 20 to have the aggravated assault count dismissed, arguing the State had failed to provide sufficient evidence Bear knowingly touched Officer T. with the intent to injure, insult, or provoke a peace officer. The court convicted Bear of resisting arrest and escape in the third degree. As Bear had no prior criminal history, the court designated the offenses as misdemeanors and placed Bear on one year of unsupervised probation.

¶9 Bear filed a timely notice of appeal. We have jurisdiction under Arizona Constitution Article 6, Section 9 and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(1) (Supp. 2008).

DISCUSSION

¶10 As this is an *Anders* appeal, no issues were preserved, and we review for fundamental error. *State v. Barraza*, 209 Ariz. 441, 447, ¶ 21, 104 P.3d 172, 178 (App. 2005). A defendant who fails to object to an error at trial forfeits the right to obtain appellate relief except when the error is fundamental. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Error is fundamental when it reaches the foundation of the case or takes from the defendant a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for the defendant to have had a fair trial. *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). To prevail, a defendant must establish the error caused prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶11 Resisting arrest requires proof that the defendant (1) intentionally prevented, or attempted to prevent, (2) a person reasonably known to her to be a peace officer, (3) acting under color of official authority, (4) from effecting an arrest (5) using or threatening to use physical force. A.R.S. § 13-2508(A) (2001). Here, the evidence was sufficient to prove these elements beyond a reasonable doubt. The only issues meriting discussion are whether Bear could resist arrest once handcuffed and whether she used physical force.

¶12 A suspect who has been handcuffed may still commit the crime of resisting arrest. *State v. Mitchell*, 204 Ariz. 216, 216-17, ¶ 1, 62 P.3d 616, 616-17 (2003) (declining to articulate a bright-line rule for determining when an arrest has been effected for resisting arrest purposes). In *Mitchell*, the defendant, who had already been handcuffed, pulled away from the officers who were escorting him to a police vehicle. *Id.* at 217, ¶¶ 5-6, 62 P.3d at 617. A struggle ensued, and the defendant wrapped his legs around one officer, pulling everyone to the ground. *Id.* at ¶ 6. The court reasoned effecting an arrest is a process or transaction beginning with a person's seizure and encompassing acts necessary to effect the formal charging of a crime, rather than an instantaneous event. *Id.* at 218, ¶ 13, 62 P.3d at 618 (citing *State v. Bay*, 721 N.E.2d 421, 422 (Ohio Ct. App. 1998) (resisting arrest charge arose from incident nearly thirty minutes after police handcuffed defendant)).

¶13 Moreover, resisting arrest does not require "any particular type of physical conduct." *State v. Lee*, 217 Ariz. 514, 517, ¶ 12, 176 P.3d 712, 715 (App. 2008) (concluding "[t]hose who use physical force against police officers attempting to arrest them are not entitled to engage in 'minor scuffling'"). In *Lee,* the defendant was convicted of resisting arrest for jerking her arm away from two arresting officers,

causing all three to fall, and trying to prevent them from placing her hands behind her back. *Id.*

¶14 In this case, Officer L. handcuffed Bear before she was placed in the patrol vehicle, but her left hand became free. While Officer T. was trying to recuff her, Bear tucked her left arm into her chest and kept pulling her right arm away. After Officer T. pulled her to the ground, she continued to struggle until Officer L. grabbed her arm and assisted Officer T. in recuffing her. Because Bear's hand became free, the officers were trying to recuff her, and her conduct could reasonably be characterized as "minor scuffling," there is sufficient evidence to support a finding that Bear intentionally attempted to prevent the officers from arresting her.

¶15 Escape in the third degree requires proof that appellant (1) was arrested for a misdemeanor and (2) knowingly escaped or attempted to escape from custody. A.R.S. § 13-2502(A) (2001). The appellant does not have to know the reason he was arrested for the misdemeanor offense. *State v. Mena*, 128 Ariz. 244, 246-47, 624 P.2d 1292, 1294-1295 (App. 1980) (concluding it was not necessary for police officers to inform defendant of the reason for his arrest in order to find him guilty of escape), *vacated in part on other grounds*, 128 Ariz. 226, 624 P.2d 1274 (1981). Nor does the State have to prove the elements of the underlying misdemeanor offense to sustain an

escape conviction. *State v. Stevens*, 154 Ariz. 510, 513, 744 P.2d 37, 40 (App. 1987) (conviction of the underlying offense is not an element of escape; it suffices that there be custody, whether arising from arrest, criminal charges, or conviction).

¶16 Here, Bear was arrested for a misdemeanor. Although Bear testified to confusion regarding the reason for her arrest, her lack of knowledge concerning what she had been arrested for is irrelevant; only the fact of her arrest is a necessary element of third-degree escape. *See Mena*, 128 Ariz. at 247, 624 P.2d at 1295. We therefore hold the arrest was sufficient to satisfy the first element of third-degree escape. *See Stevens*, 154 Ariz. at 513, 744 P.2d at 40.

¶17 The evidence is also sufficient to prove Bear knowingly attempted to escape from custody. Officer T. saw Bear's hand reaching out the police vehicle's window toward the door handle, which was unlocked, and Bear admitted she knew there was no handle inside the vehicle. When Officer T. reached the vehicle, Bear's left hand was not handcuffed, and she appeared to be attempting to remove the handcuff from her right hand as well.

¶18 We note that there is a question whether Bear could be convicted if she had not been lawfully in custody. Officer T. stated Bear was initially arrested for obstructing governmental operations, a class one misdemeanor. *See* A.R.S. § 13-2402(C)

(2001). The State did not charge Bear with that offense and agreed with the trial court that the arrest was illegal.[1]

¶19 There is no Arizona law directly on point whether an escape from unlawful custody violates Arizona criminal law. The escape statutes do not require that the custody be lawful. *See* A.R.S. § 13-2501(3) (Supp. 2008) (defining custody without reference to lawfulness). There also is a conflict of authority on the question in other jurisdictions. *See generally,* W.E. Shipley*, What Justifies Escape or Attempt to Escape, or Assistance in that Regard*, 70 A.L.R. 2d 1430, 1433-1443 (1960). For the reasons that follow, we hold that at least on these facts, Bear's unlawful arrest would not justify her attempt at escape.

¶20 Some courts have held the crime of escape necessarily involves leaving lawful custody, and a defendant charged with escape can assert as a defense he was not lawfully held at the time of escape. *See United States v. McKim*, 509 F.2d 769, 774 (5th Cir. 1975) (holding lawful arrest resulting in custody from which defendant escaped was an essential element of escape from federal custody); *State v. Searles*, 635 A.2d 940, 941 (Me. 1993)

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[1] Obstructing governmental operations requires using or threatening to use violence or physical force to obstruct, impair, or hinder performance of a governmental function by a public servant acting under color of his official authority. A.R.S. § 13-2402(A)(1) (2001). Officer L. testified Bear did not use or threaten to use violence or physical force to hinder the police investigation.

(noting statute provides for defense in case of escape from arrest when arresting officer acted unlawfully in making the arrest); *State v. McVay*, 833 P.2d 293, 296 (Or. 1992) (holding defendant did not commit crime of escape because he was not lawfully arrested). In these jurisdictions, however, the crime of escape requires a lawful arrest for the underlying offense by statute.[2]

¶21 In other states, a defendant can be convicted of escape even though the underlying arrest or conviction was unlawful. *See People v. Lanzieri*, 25 P.3d 1170, 1174-1175 (Colo. 2001) (concluding procedural defects in a defendant's confinement are appropriately raised by legal means rather than through unauthorized departure from custody); *State v. Gonzales*, 693 P.2d 119, 120 (Wash. 1985) (holding State is not required to prove defendant had been detained pursuant to a constitutionally valid conviction in prosecution for escape).

¶22 A number of cases have held that where imprisonment is under color of law, a prisoner is not entitled to resort to self-help but must apply for release through legal channels, even though he might be able to show defects in the procedure by which he was arrested, tried, sentenced, committed, or imprisoned as to justify his release on appeal or habeas corpus.

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[2] *See* 18 U.S.C. § 751(a) (Supp. 2007); 17-A Me. Rev. Stat. § 755(2) (2006); Or. Rev. Stat. § 162.145(2) (2003).

See Aderhold v. Soileau, 67 F.2d 259, 260 (5th Cir. 1933) (holding inmates who believe their confinements are improper are bound to use legal means to test the question rather than resort to escape); *United States v. Jerome*, 130 F.2d 514, 519 (2d Cir. 1942), *rev'd on other grounds*, 318 U.S. 101 (1943) (noting that even if the accused had not been held on a proper charge, the escape statute was clearly intended to reach anyone held by virtue of any proper and legal process).

¶23 In evaluating whether an individual can be guilty of escaping from an unlawful arrest, some jurisdictions have analogized from cases finding a defendant can be charged with resisting arrest even if the arrest is unlawful. *See Lanzieri*, 25 P.3d at 1175 (adopting reasoning that rights available to an arrestee today far exceed those available to persons arrested under the common-law rule allowing resistance to unlawful arrests and holding defendant should not challenge the legality of his sentence by escaping when he has the means to seek relief through judicial channels).

¶24 Arizona traditionally followed the common-law rule that a person may resist an illegal arrest. *See Dugan v. State*, 54 Ariz. 247, 250, 94 P.2d 873, 874 (1939) (holding a person illegally arrested may resist the arrest, using such force as may be reasonably necessary, short of killing the arresting officer); *State v. Robinson*, 6 Ariz. App. 424, 427, 433 P.2d 75,

78 (1967). There was a trend, however, in the 1970s away from the common-law rule and toward the judicial settlement of such disputes. *See State v. Lockner*, 20 Ariz. App. 367, 371, 513 P.2d 374, 378 (1973) (stating "[t]he phrase 'short of killing the arresting officer' chills this court"); *State v. Hatton*, 116 Ariz. 142, 147-48, 568 P.2d 1040, 1045-1046 (1977) (questioning a blanket right to resist arrest and sub silentio overruling *Dugan*). This trend culminated in the legislature providing that the threat or use of physical force is not justified to resist arrest, whether lawful or unlawful. *See* 1977 Ariz. Sess. Laws, ch. 142, § 86 (1st Reg. Sess.).[3]

¶25 Permitting an individual to resort to self-help to escape from an illegal arrest, rather than seeking a remedy through the legal system, would invite violence and endanger public safety. *Cf. Lockner*, 20 Ariz. App. at 371, 513 P.2d at 378 (allowing resistance to unlawful arrest invites violence); *United States v. Ferrone*, 438 F.2d 381, 390 (3d Cir. 1971) (minimizing the use of violent self-help in the resolution of disputes between citizens and the government is an especially strong societal interest); *State v. Ramsdell*, 285 A.2d 399 (R.I.

[3] A.R.S. § 13-404(B) (2001) now provides that "[t]he threat or use of physical force against another is not justified . . . [t]o resist an arrest that the person knows or should know is being made by a peace officer . . . whether the arrest is lawful or unlawful, unless the physical force used by the peace officer exceeds that allowed by law . . . ."

1971) (explaining self-help exposes both the officer and the suspect to graver consequences than an unlawful arrest). The same public policy that permits a conviction for resisting arrest even if the arrest is unlawful should authorize a conviction for escape despite the unlawfulness of the underlying arrest.

¶26 We therefore hold even if Bear's arrest was unlawful, she should have resolved that issue through the legal process. As long as that process was available, an unlawful arrest would not justify self-help.

CONCLUSION

¶27 After careful review of the record, we find no meritorious grounds for reversal of Bear's conviction or modification of the sentence imposed. The evidence supports the judgment, the sentence imposed was within the sentencing limits, Bear was represented and present at all stages of the proceedings below, and the court gave her an opportunity to speak at the sentencing. Accordingly, we affirm Bear's conviction and sentence.

¶28 Upon the filing of this decision, counsel shall inform Bear of the status of the appeal and her options. Defense counsel has no further obligations, unless upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz.

582, 584-85, 684 P.2d 154, 156-57 (1984). Bear shall have thirty days from the date of this decision to proceed, if she desires, with a pro per motion for reconsideration or petition for review.

DONN KESSLER, Judge

CONCURRING:

JON W. THOMPSON, Presiding Judge

MARGARET H. DOWNIE, Judge